

ENVIRONMENTAL PROTECTION AGENCY

40 CFR 51 and 52

[FRL - _____, E-Docket ID No. A-2001-0004 (Legacy Docket ID No. A-90-37)]

**Prevention of Significant Deterioration (PSD) and Non-attainment
New Source Review (NSR): Reconsideration**

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of final action on reconsideration; amendment to final rules.

SUMMARY: On December 31, 2002 and March 10, 2003, EPA revised regulations governing the major New Source Review (NSR) programs mandated by parts C and D of title I of the Clean Air Act (CAA or Act). Following these actions, the Administrator received a number of petitions for reconsideration. On July 30, 2003, EPA announced its reconsideration of certain issues arising from the final rules of December 31, 2002. We (the EPA) requested public comment on six issues for which we granted reconsideration. As a result of this reconsideration process, we have concluded that two clarifications to the underlying rules are warranted, which are: (1) to include a definition of "replacement unit" and (2) to clarify that the plantwide applicability limitation (PAL) baseline calculation procedures for newly constructed units do not apply to modified units. With respect to all other issues

raised by the petitioners, we deny the requests for reconsideration.

EFFECTIVE DATE: This final action is effective on **[INSERT DATE 60 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER.]**

ADDRESSES: Docket. Docket No. A-90-37 (E-Docket ID No. OAR-2001-0004), containing supporting information used to develop the proposed rule and the final rule, is available for public inspection and copying between 8:00 a.m. and 4:30 p.m., Monday through Friday (except government holidays) at the Air and Radiation Docket and Information Center (6102T), Room B108, EPA West Building, 1301 Constitution Avenue, NW Washington, DC 20460; telephone (202) 566-1742, fax (202) 566-1741. A reasonable fee may be charged for copying docket materials. Worldwide Web (WWW). In addition to being available in the docket, an electronic copy of this final action will also be available on the WWW. Following signature, a copy of the notice will be posted on the EPA's NSR page: <http://www.epa.gov/nsr>.

FOR FURTHER INFORMATION CONTACT: Ms. Lynn Hutchinson, Information Transfer and Program Integration Division (C339-03), U.S. Environmental Protection Agency, Research Triangle Park, NC 27711, telephone (919) 541-5795, or electronic mail at hutchinson.lynn@epa.gov, or Ms. Janet McDonald, at the same

street address, telephone (919) 541-1450, or electronic mail at
mcdonald.janet@epa.gov.

SUPPLEMENTARY INFORMATION:

I. General Information

A. What are the regulated entities?

Entities potentially affected by the subject rule for today's action include sources in all industry groups. The majority of sources potentially affected are expected to be in the following groups.

Industry Group	SIC ^a	NAICS ^b
Electric Services	491	221111, 221112, 221113, 221119, 221121, 221122
Petroleum Refining	291	324110
Industrial Inorganic Chemicals	281	325181, 325120, 325131, 325182, 211112, 325998, 331311, 325188
Industrial Organic Chemicals	286	325110, 325132, 325192, 325188, 325193, 325120, 325199
Miscellaneous Chemical Products	289	325520, 325920, 325910, 325182, 325510
Natural Gas Liquids	132	211112
Natural Gas Transport	492	486210, 221210

Pulp and Paper Mills	261	322110, 322121, 322122, 322130
Paper Mills	262	322121, 322122
Automobile	371	336111, 336112, 336211,
Manufacturing		336992, 336322, 336312, 336330, 336340, 336350, 336399, 336212, 336213
Pharmaceuticals	283	325411, 325412, 325413, 325414

^a Standard Industrial Classification

^b North American Industry Classification System.

Entities potentially affected by the subject rule for today's action also include State, local, and tribal governments.

B. How can I get copies of this document and other related information?

1. Docket. EPA has established an official public docket for this action under E-Docket ID No. OAR-2001-0004 (Legacy Docket ID No. A-90-37). The official public docket consists of the documents specifically referenced in this action, any public comments received, and other information related to this action. Although a part of the official docket, the public docket does not include Confidential Business Information (CBI) or other

information whose disclosure is restricted by statute. The official public docket is the collection of materials that is available for public viewing at the EPA Docket Center (Air Docket), U.S. Environmental Protection Agency, EPA West Building, 1301 Constitution Avenue, NW, Room B108, Mail Code: 6102T, Washington, DC 20460. The EPA Docket Center Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Reading Room is (202) 566-1742. A reasonable fee may be charged for copying.

2. Electronic Access. You may access this Federal Register document electronically through the EPA Internet under the "Federal Register" listings at <http://www.epa.gov/fedrgstr/>.

An electronic version of a portion of the public docket is available through EPA's electronic public docket and comment system, EPA Dockets. Interested persons may use EPA Dockets at <http://www.epa.gov/edocket/> to submit or view public comments, access the index listing of the contents of the official public docket, and access those documents in the public docket that are available electronically. Once in the system, select "search," then key in the appropriate docket identification number.

Certain types of information will not be placed in the EPA

Dockets. Information claimed as CBI and other information whose disclosure is restricted by statute, which is not included in the official public docket, will not be available for public viewing in EPA's electronic public docket. EPA's policy is that copyrighted material will not be placed in EPA's electronic public docket but will be available only in printed, paper form in the official public docket. To the extent feasible, publicly available docket materials will be made available in EPA's electronic public docket. When a document is selected from the index list in EPA Dockets, the system will identify whether the document is available for viewing in EPA's electronic public docket. Although not all docket materials may be available electronically, you may still access any of the publicly available docket materials through the docket facility identified in section I.B.1. EPA intends to work towards providing electronic access to all of the publicly available docket materials through EPA's electronic public docket.

For additional information about EPA's electronic public docket visit EPA Dockets online or see 67 FR 38102, May 31, 2002.

C. Where can I obtain additional information?

In addition to being available in the docket, an

electronic copy of this final action will also be available on the WWW. Following signature, a copy of the notice will be posted on the EPA's NSR page: <http://www.epa.gov/nsr>.

D. How is this preamble organized?

The information presented in this preamble is organized as follows:

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 - I. National Technology Transfer and Advancement Act
 - J. Congressional Review Act
- V. Statutory Authority
- VI. Judicial Review

II. Background

For a brief history of the NSR rulemaking process that preceded today's final action, see our discussion at 68 FR 44623 (July 30, 2003). On December 31, 2002, we issued a final rule (67 FR 80186) that revised regulations governing the major NSR programs (final rules).¹ The revisions included five major changes to the major NSR program that will reduce burden, maximize operating flexibility, improve environmental quality, provide additional certainty, and promote administrative efficiency. These elements include baseline actual emissions, actual-to-projected-actual emissions methodology, plantwide applicability limitations (PALs), Clean Units, and pollution control projects (PCPs). The final rules also codified our longstanding policy regarding the calculation of baseline emissions for electric utility steam generating units (EUSGUs). In addition, the final action: (1) responded to comments we received on a proposal to adopt a methodology, developed by the American Chemistry Council (formerly known as the Chemical Manufacturers Association (CMA)) and other industry petitioners, to determine whether a major stationary source has undertaken a

¹The December 31, 2002 final rules did not act on several issues proposed in 1996. We intend to act on some or all issues from the 1996 proposal in subsequent Federal Register notices.

major modification based on its potential emissions; and (2) included a new section that spells out in one place how a major modification is determined under the various major NSR applicability options. This topic had previously been addressed primarily in the definition section of the major NSR regulations. We also clarified where to find the provisions in the revised rules and codified a definition of "regulated NSR pollutant" that clarifies which pollutants are regulated under the Act for purposes of major NSR.

On February 28, 2003, we sent notice to affected States that, consistent with our proposal in 1996, we were revising the references to 40 CFR 52.21 in delegated States' plans to reflect the December 31, 2002 changes in the Prevention of Significant Deterioration (PSD) Federal Implementation Plan (FIP) (40 CFR 52.21(a)(2) and (b) through (bb)). This FIP applies in any area that does not have an approved PSD program in the State Implementation Plan (SIP), and in all Indian country. The notice was subsequently published in the Federal Register on March 10, 2003 (68 FR 11316).

Following publication of the December 31, 2002 and March 10, 2003 Federal Register notices, and prior to July 2003, the Administrator received numerous petitions, filed

pursuant to section 307(d)(7)(B) of the CAA, requesting reconsideration of many aspects of the final rules.²

On July 30, 2003 (68 FR 44624), we granted reconsideration on six issues raised by petitioners who had filed petitions

²Petitions for reconsideration of the December 31, 2002 final rule that EPA received before July 2003 were filed by: Northeastern States (CT, ME, MD, MA, NH, NJ, NY, PA, RI, VT); South Coast Air Quality Management District (CA); and Environmental Groups (led by NRDC, Earthjustice, Clean Air Task Force, and Environmental Defense). Additional petitioners joined existing petitions: The People of California and California Air Resources Board (joined South Coast and Northeastern States petitions); Yolo-Solano Air Quality Management District (CA) (joined South Coast petition); Santa Barbara, Ventura, and Monterey Air Pollution Control Districts (CA); and Sacramento Air Quality Management District (CA) (joined South Coast petition). Petitions for reconsideration of the FIP rule were filed by: Delegated States (CA, CT, IL, MA, NJ, NY, DC, South Coast Air Quality Management District (CA), and Santa Barbara Air Pollution Control District (CA)); and Environmental Groups (essentially the same groups that filed petitions to reconsider the December 31, 2002 rule).

On July 11, 2003, we received another petition for reconsideration filed by Newmont USA Limited, dba Newmont Mining Corporation. This petition was subsequently joined by the National Cattlemen's Beef Association and the National Mining Association. We are not responding to that petition at this time, but will do so in the near future.

prior to July 2003.³ At that time, we did not act on any of the remaining issues in those petitions. Instead, we indicated that we planned to announce our final decision on whether to reconsider the remaining petition

issues no later than 90 days after the publication of the Federal Register notice.

The first of the six issues on which we granted reconsideration involves a document we released in November 2002, entitled "Supplemental Analysis of the Environmental Impact of the 2002 Final NSR Improvement Rules."⁴ Our purpose in granting reconsideration on this issue was to provide the public an opportunity to comment on our analysis and to submit any additional information that they believe to be relevant to the inquiry. The remaining issues for which we granted reconsideration involved five narrow aspects of the final rule as follows:

- Using potential-to-emit (PTE) to determine baseline actual

³In this notice, the term "petitioner" refers only to those entities that filed petitions for reconsideration with EPA prior to July 2003.

⁴Available through our NSR website at <http://www.epa.gov/nsr> and in Docket ID No. A-90-37, Document IV-A-7.

emissions for an emissions unit on which actual construction began after the 24-month PAL baseline period when establishing a PAL;

- Eliminating synthetic minor limits [(r)(4) limits] under the PAL;
- Including a "reasonable possibility" requirement for triggering recordkeeping and reporting provisions;
- Using the actual-to-projected-actual test for replacement units; and,
- Effect of redesignation of an area from attainment to nonattainment on Clean Unit status.

We describe these issues at 68 FR 44624. For the reasons indicated at 68 FR 44624, we did not grant a stay of the final rules pending our reconsideration of these issues.

On August 14, 2003, we held a public hearing on the issues for which we granted reconsideration. Twenty-two individuals gave oral presentations at the hearing. The transcript of their comments is located in Docket OAR-2001-0004 (Legacy Number A-90-37), which can be accessed on the internet at <http://www.epa.gov/edocket>.

We provided a public comment period on the reconsideration issues that ended on August 29, 2003. For issues arising out of

the August 14th public hearing, the comment period was extended until September 15, 2003. More than 400 written public comments on the reconsideration issues were received. The individual comment letters can be found in Docket OAR-2001-0004 (Legacy Number A-90-37).

III. Today's Action

At this time, we are announcing our final action after reconsideration of these six issues. We are also announcing our final decision on reconsideration of the remaining issues that were raised by the petitioners. Today, we are making available a document entitled, "Technical Support Document for Prevention of Significant Deterioration (PSD) and Non-attainment New Source Review (NSR): Reconsideration," EPA 456/R-03-005 (Technical Support Document). This document contains (1) a summary of comments received on the issues for which we granted reconsideration and our responses to these comments, and (2) a summary of petition issues for which we are not granting reconsideration, and our rationale for denying reconsideration. This document is available on our website at <http://www.epa.gov/nsr/>; and, through the National Technical Information Services, 5285 Port Royal Road, Springfield, VA 22161; telephone (800) 553-6846, email <http://www.ntis.gov>; and,

from the US EPA, Library Services, MD C267-01, Research Triangle Park, NC 27711, telephone (919) 541-2777, e-mail library.rtp@epa.gov.

A. Six Issues for Which Reconsideration Was Granted

We received numerous responses to our request for comment on the "Supplemental Analysis of the Environmental Impact of the 2002 Final NSR Improvement Rule." After carefully considering the information that was submitted, we have determined that none of the new information presented leads us to conclude that the analysis was incorrect or substantially flawed. Therefore, we are re-affirming the validity of the original conclusions. A summary of the comments received and our responses to these comments can be found in our Technical Support Document.

With respect to the five remaining issues on which we granted reconsideration, we have concluded that two clarifications to the underlying rules are warranted. These changes relate to issues raised as a result of our request for comment on; (1) whether replacement units should be allowed to use the actual-to-projected-actual applicability test to determine whether installing a replacement unit results in a significant emissions increase; and, (2) using potential-to-emit (PTE) to determine the baseline actual emissions for an

emissions unit on which construction began after the 24-month baseline period when establishing a PAL. As explained below, while we are not making any changes to the general approach in the final rules with respect to these issues, we are making two clarifying changes to the regulations. First, we are adding a definition of replacement unit to the final rules. Second, we are clarifying that the potential-to-emit approach for determining baseline actual emissions when establishing a PAL is only available to emissions units that are added to the major stationary source after the 24-month baseline period, and is not available to emissions units that existed

during the baseline period whether or not they have been modified since that time.

We are not making any changes to the final rules with respect to eliminating synthetic minor limits [(r)(4) limits] under the PAL, the "reasonable possibility" requirement for triggering recordkeeping and reporting provisions, or the effect of redesignation of an area from attainment to nonattainment on Clean Unit status. Our reasons for this conclusion, and our response to significant comments received, are summarized in our Technical Support Document.

1. Replacement Units

We have decided to continue to allow the owner or operator of a major stationary source (you) to use the actual-to-projected-actual applicability test to determine whether installing a replacement unit results in a significant emissions increase. However, as we reconsidered this issue and reviewed comments, we found one commenter that recommended that EPA include a definition of "replacement unit" in the regulations. The commenter asked that this definition describe how the replacement unit may differ from the replaced unit. The commenter also recommended that we indicate that the replaced unit must be removed from the site or rendered permanently inoperable.

We believe that the current rules, as supplemented by the discussion in the December 2002 preamble, are self-implementing for replacement units. Nevertheless, we agree with the commenter that a definition of "replacement unit" would render implementation easier. Thus, today we are adding regulatory language to further clarify our intentions regarding replacement units. Today's action revises the definition of "emissions unit" to clarify that a replacement unit is considered an existing emissions unit (e.g., §51.166(b)(7)(ii)) and therefore

is eligible for the actual-to-projected-actual test for major NSR applicability determinations.

In addition, today's rule revisions add a definition of "replacement unit" that codifies longstanding policy and practice. In the preamble to the 1992 WEPCO rule, we first stated that we would "consider a unit to be replaced if it would constitute a reconstructed unit within the meaning of 40 CFR 60.15," which is the section of the New Source Performance Standards (NSPS) General Provisions that governs reconstruction. See 57 FR 32323, column 1. We have adopted this threshold in today's rule, by defining "replacement unit" to include reconstructed units, as well as emissions units that completely take the place of an existing emissions unit. See, e.g., §51.166(b)(32)(i).

We note that we have never considered "replacement units" to include replacements that significantly change the nature of the replaced unit; it is this inherent limitation that makes the application of the actual-to-projected-actual applicability test appropriate. It is reasonable to compare the baseline actual emissions from the replaced unit to the projected actual emissions of the replacement unit because the units are effectively the same existing emissions unit. Thus, consistent

with the recently finalized equipment replacement exclusion provisions, the limiting principle here is that the replacement unit must be identical or functionally equivalent and must not change the basic design parameters of the affected process unit (e.g., for EUSGUs this might mean heat input and fuel consumption specifications). See, e.g., §§51.166(b)(32)(ii) and (iii). We also believe, however, that we need not and should not treat efficiency as a basic design parameter, as we do not believe major NSR was intended to impede industry in making energy and process efficiency improvements. We believe such improvements, on balance, will be beneficial both economically and environmentally.

We also believe that it has always been implicit in the concept of a replacement unit that the replaced unit must cease operation. Today's rule makes this principle explicit by requiring you to remove or permanently disable the replaced unit, or take a permit condition to permanently prohibit its operation. In general, if you bring the replaced unit back into operation, it must be treated as a new emissions unit, to which the actual-to-potential emissions test applies. See, e.g., §51.166(b)(32)(iv).

Finally, today's rule spells out that you cannot generate

an emissions reduction credit from emissions reductions that are attributable to the shutdown of the replaced emissions unit.

See, e.g., §51.166(b)(32). This provision addresses concerns about the possible double-counting of emissions reductions that could otherwise occur. Thus, if you use the baseline actual emissions of the replaced unit when applying the actual-to-projected-actual emissions test to measure the emissions increase resulting from the replacement unit, you cannot subsequently take credit for the emissions reductions that occur when you shut down the replaced unit. However, this provision is not intended to prevent you from generating creditable emissions reductions through other activities at the replacement unit.

For example, you may be able to generate an emissions reduction credit if you reduce emissions by installing an inherently less-polluting replacement unit and accept an enforceable emission limitation that is lower than the baseline actual emissions of the replaced unit. Such an emissions reduction would be creditable if all other criteria for generating such credit are met.

2. Emission Units for Which You Began Actual Construction After the PAL Baseline Period

We have decided to retain the calculation method that uses

potential-to-emit (PTE) to determine the baseline actual emissions for an emissions unit for which you began actual construction after the 24-month PAL baseline period when establishing a PAL. As we reconsidered this issue and reviewed comments, however, we decided it was appropriate to clarify that this method of calculation applies only to emissions units initially constructed after the PAL baseline period.

As reflected in the July 30, 2003 Federal Register notice, our intent was to limit the use of PTE to emissions units that were not in existence during the baseline period. We explained in the July notice that we included this provision, and the provision requiring the emissions of shut down units to be subtracted from the PAL level, "in recognition that the set of emissions units at your source at the time of PAL permit issuance may be different from the set of emissions units that existed during the baseline period. You may have constructed additional emissions units, permanently shut down previously existing emissions units, or both." See 68 FR 44625, column 3.

However, in providing for the inclusion of PTE for some units, the language of the rule referred only to "units on which actual construction began" after the PAL baseline period. See, e.g., 40 CFR 52.21(aa)(6). "Construction" is defined as "any

physical change or change in the method of operation (including fabrication, erection, installation, demolition, or modification of an emissions unit) which would result in a change in actual emissions." See, e.g., 40 CFR 52.21(b)(8). Because the definition of "construction" encompasses modifications, we are concerned that, in the future, there might be confusion regarding the intended scope of this provision. It was not our intention to extend this provision to units that merely undergo a modification following the baseline period. Therefore, we are changing the rule language to explicitly exclude such units.

B. Remaining Issues in Petitions for Reconsideration

We deny the petitioners' requests for reconsideration on the remaining issues raised in the petitions, because they have failed to meet the standard for reconsideration under section 307(d)(7)(B) of the CAA. Specifically, the petitioners have failed to show: that it was impracticable to raise their objections during the comment period, or that the grounds for their objections arose after the close of the comment period; and/or that their concern is of central relevance to the outcome of the rule. We discuss our reasons for denying reconsideration in the Technical Support Document, which is available on our website at <http://www.epa.gov/nsr>.

IV. Statutory and Executive Order Reviews

On December 31, 2002, we finalized rule changes to the regulations governing the NSR programs mandated by parts C and D of title I of the Act. With today's action we are promulgating two minor clarifications to the final rules. Accordingly, we believe that the rationale provided with the final rules is still applicable and sufficient.

A. Executive Order 12866--Regulatory Planning and Review

Under Executive Order 12866 (58 FR 51735, October 4, 1993), the Agency must determine whether the regulatory action is "significant" and therefore subject to Office of Management and Budget (OMB) review and the requirements of the Executive Order. The Order defines "significant regulatory action" as one that is likely to result in a rule that may:

(1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impact of entitlements,

grants, user fees, or loan programs, or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

Pursuant to the terms of Executive Order 12866, OMB has notified EPA that it considers this a "significant regulatory action" within the meaning of the Executive Order. EPA has submitted this action to OMB for review. Changes made in response to OMB suggestions or recommendations will be documented in the public record.

B. Paperwork Reduction Act

This action does not impose any new information collection burden. We are not promulgating any new paperwork (e.g., monitoring, reporting, recordkeeping) as part of today's final action. The OMB has previously approved the information collection requirements contained in the existing regulations (40 CFR parts 51 and 52) under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 et seq., and has assigned OMB control number 2060-0003, EPA ICR number 1230.11. A copy of the OMB approved Information Collection Request (ICR) may be obtained from Susan Auby, Collection Strategies Division; U.S.

Environmental Protection Agency (2822T); 1200 Pennsylvania Avenue, NW, Washington, DC 20460 or by calling (202) 566-1672.

Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in 40 CFR are listed in 40 CFR part 9.

C. Regulatory Flexibility Analysis

The EPA has determined that it is not necessary to prepare a regulatory flexibility analysis in connection with this final

rule.

For purposes of assessing the impacts of today's action on small entities, a small entity is defined as: (1) a small business that is a small industrial entity as defined in the U.S. Small Business Administration (SBA) size standards (see 13 CFR 121.201); (2) a small governmental jurisdiction that is a government of a city, county, town, school district, or special district with a population of less than 50,000; or (3) a small organization that is any not-for-profit enterprise that is independently owned and operated and is not dominant in its field.

After considering the economic impacts of today's action on small entities, EPA has concluded that this action will not have a significant economic impact on a substantial number of small entities. In determining whether a rule has a significant economic impact on a substantial number of small entities, the impact of concern is any significant adverse economic impact on small entities, since the primary purpose of the regulatory flexibility analyses is to identify and address regulatory alternatives "which minimize any significant economic impact of the proposed rule on small entities." 5 U.S.C. sections 603 and 604. Thus, an agency may conclude that a rule will not have a

significant economic impact on a substantial number of small entities if the rule relieves regulatory burden, or otherwise has a positive economic effect, on all of the small entities subject to the rule. A Regulatory Flexibility Act Screening Analysis (RFASA), developed as part of a 1994 draft Regulatory Impact Analysis (RIA) and incorporated into the September 1995 ICR renewal analysis, showed that the changes to the NSR program due to the 1990 Clean Air Act amendments would not have an adverse impact on small entities. This analysis encompassed the entire universe of applicable major sources that were likely to also be small businesses (approximately 50 "small business" major sources). Because the administrative burden of the NSR program is the primary source of the NSR program's regulatory costs, the analysis estimated a negligible "cost to sales" (regulatory cost divided by the business category mean revenue) ratio for this source group. Currently, and as reported in the current ICR, there is no economic basis for a different conclusion.

We believe the rule changes in the December 31, 2002 final rule will reduce the regulatory burden associated with the major NSR program for all sources, including all small businesses, by improving the operational flexibility of owners and operators,

improving the clarity of requirements, and providing alternatives that sources may take advantage of to further improve their operational flexibility. Today's action consists of two minor clarifications to the December 31, 2002 final rule and does not change our overall assessment of regulatory burden. We have therefore concluded that the rule changes in December 31, 2002 final rule, as clarified by today's action, will relieve regulatory burden for all small entities.

D. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Pub. L. 104-4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. Under section 202 of the UMRA, EPA generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with "Federal mandates" that may result in expenditures to State, local, and tribal governments, in the aggregate, or to the private sector, of \$100 million or more in any 1 year. Before promulgating an EPA rule for which a written statement is needed, section 205 of the UMRA generally requires EPA to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective or

least burdensome alternative that achieves the objectives of the rule. The provisions of section 205 do not apply when they are inconsistent with applicable law. Moreover, section 205 allows EPA to adopt an alternative other than the least costly, most cost-effective or least burdensome alternative if the Administrator publishes with the final rule an explanation as to why that alternative was not adopted. Before EPA establishes any regulatory requirements that may significantly or uniquely affect small governments, including tribal governments, it must have developed under section 203 of the UMRA a small government agency plan.

The plan must provide for notifying potentially affected small governments, enabling officials of affected small governments to have meaningful and timely input in the development of EPA regulatory proposals with significant Federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements.

We have determined that today's action does not contain a Federal mandate that may result in expenditures of \$100 million or more for State, local, and tribal governments, in the aggregate, or the private sector in any 1 year. Although

initially the changes in the December 31, 2002 final rule are expected to result in a small increase in the burden imposed upon reviewing authorities in order for them to be included in the State's SIP, as well as other small increases in burden discussed under "Paperwork Reduction Act" in the preamble to the December 31, 2002 final rule, those revisions will ultimately provide greater operational flexibility to sources permitted by the States, which will in turn reduce the overall burden of the program on State and local authorities by reducing the number of required permit modifications. In addition, we believe the 2002 rule changes will actually reduce the regulatory burden associated with the major NSR program by improving the operational flexibility of owners and operators, improving the clarity of requirements, and providing alternatives that sources may take advantage of to further improve their operational flexibility. Today's action does not increase regulatory burden but merely clarifies two aspects of the 2002 rule changes. Thus, today's action is not subject to the requirements of sections 202 and 205 of the UMRA. For the same reasons stated above, we have determined that today's action contains no regulatory requirements that might significantly or uniquely affect small governments. Thus, today's action is not subject

to the requirements of section 203 of the UMRA.

E. Executive Order 13132--Federalism

Executive Order 13132, entitled "Federalism" (64 FR 43255, August 10, 1999), requires EPA to develop an accountable process to ensure "meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications." "Policies that have federalism implications" is defined in the Executive Order to include regulations that have "substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government."

Today's action does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. While the final rule published on December 31, 2002 will result in some expenditures by the States, we expect those expenditures to be limited to \$331,250 per year. This figure includes the small increase in the burden imposed upon reviewing authorities in order for them to revise the State's SIP.

However, the revisions contained in the December 31, 2002 final rule provide greater operational flexibility to sources permitted by the States, which will in turn reduce the overall burden of the program on State and local authorities by reducing the number of required permit modifications. Today's action does not increase regulatory burden but merely clarifies two aspects of the December 31, 2002 final rule. Thus, Executive Order 13132 does not apply to today's action.

F. Executive Order 13175—Consultation and Coordination with Indian Tribal Governments

Executive Order 13175, entitled "Consultation and Coordination with Indian Tribal Governments" (65 FR 67249, November 9, 2000), requires EPA to develop an accountable process to ensure "meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications." Today's action does not have tribal implications as specified in Executive Order 13175. Thus, Executive Order 13175 does not apply to this action.

The purpose of the December 31, 2002 final rule is to add greater flexibility to the existing major NSR regulations. Those changes will benefit permitting authorities and the regulated community, including any major source owned by a

tribal government or located in or near tribal land, by providing increased certainty as to when the requirements of the NSR program apply. Taken as a whole, the December 31, 2002 final rule should result in no added burden or compliance costs and should not substantially change the level of environmental performance achieved under the previous rules.

EPA anticipates that initially the changes in the December 31, 2002 final rule will result in a small increase in the burden imposed upon Reviewing Authorities in order for them to be included in the State's SIP. Nevertheless, those revisions will ultimately provide greater operational flexibility to sources permitted by the States, which will in turn reduce the overall burden of the program on State and local authorities by reducing the number of required permit modifications. In comparison, no tribal government currently has an approved tribal implementation plan (TIP) under the Clean Air Act to implement the NSR program. The Federal government is currently the NSR permitting authority in Indian country. Thus, tribal governments should not experience added burden from the December 31, 2002 final rule, nor should their laws be affected with respect to implementation of that rule. Additionally, although major stationary sources affected by the December 31, 2002 final

rule could be located in or near Indian country and/or be owned or operated by tribal governments, such sources would not incur additional costs or compliance burdens as a result of that rule. Instead, the only effect on such sources should be the benefit of the added certainty and flexibility provided by that rule. For the reasons stated above, we do not believe that today's action, which clarifies two aspects of the December 31, 2002 final rule, would increase burden for tribal governments. In addition, we do not anticipate that today's action would have substantial direct effects on sources located in or near Indian country or sources owned or operated by tribal governments.

In our July 30, 2003 notice, EPA specifically solicited additional comment on today's final action from tribal officials.

G. Executive Order 13045--Protection of Children from Environmental Health Risks and Safety Risks

Executive Order 13045, entitled "Protection of Children from Environmental Health Risks and Safety Risks" (62 FR 19885, April 23, 1997), applies to any rule that: (1) is determined to be "economically significant" as defined under Executive Order 12866; and (2) concerns an environmental health or safety risk that EPA has reason to believe may have a disproportionate

effect on children. If the regulatory action meets both criteria, the Agency must evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency.

Today's action is not subject to the Executive Order because it is not economically significant as defined in Executive Order 12866, and because the Agency does not have reason to believe the environmental health or safety risks addressed by this action present a disproportionate risk to children. We believe that the December 31, 2002 final rule as a whole will result in equal or better environmental protection than provided by earlier regulations, and do so in a more streamlined and effective manner. Similarly, today's action merely clarifies two aspects of the December 31, 2002 final rule and does not change substantially the level of environmental protection provided by that rule. As a result, today's action is not expected to present a disproportionate environmental health or safety risk for children.

H. Executive Order 13211—Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use

Today's action is not a "significant energy action" as defined in Executive Order 13211, "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use" (66 FR 28355, May 22, 2001) because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. The December 31, 2002 final rule improves the ability of sources to undertake pollution prevention or energy efficiency projects, switch to less polluting fuels or raw materials, maintain the reliability of production facilities, and effectively utilize and improve existing capacity. That rule also includes a number of provisions to streamline administrative and permitting processes so that facilities can quickly accommodate changes in supply and demand. It provides several alternatives that are specifically designed to reduce administrative burden for sources that use pollution prevention or energy efficient projects. Today's action merely clarifies two aspects of the December 31, 2002 final rule and thus is not likely to have a significant adverse effect on the supply, distribution, or use of energy.

I. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Pub. L. No. 104-113, 12(d) (15

U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical.

Voluntary consensus standards are technical standards (for example, materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. The NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

Today's action does not involve technical standards. Therefore, EPA did not consider the use of any voluntary consensus standards.

J. Congressional Review Act

The Congressional Review Act, §5 U.S.C. 801, et seq., as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. The EPA will submit a report containing the final rule and other required information to the United States Senate, the United

States House of Representatives, and the Comptroller General of the United States prior to publication of the final rule in the Federal Register. A major rule cannot take effect until 60 days after it is published in the Federal Register. This action is not a "major rule" as defined by 5 U.S.C. §804(2). The rule will be effective [INSERT DATE OF PUBLICATION OF FINAL RULE IN THE FEDERAL REGISTER].

V. Statutory Authority

The statutory authority for this action is provided by sections 101, 111, 114, 116, 301, and 307 of the CAA as amended (42 U.S.C. 7401, 7407, 7411, 7414, 7416, and 7601).

VI. Judicial Review

Under section 307(b)(1) of the Act, judicial review of the December 31, 2002 final rule is available only by the filing of a petition for review in the U.S. Court of Appeals for the District of Columbia Circuit by March 3, 2003. Any such judicial review is limited to only those objections that are raised with reasonable specificity in timely comments. Under section 307(b)(2) of the Act, the

requirements that are the subject of the December 31, 2002 final rule may not be challenged later in civil or criminal proceedings brought by us to enforce these requirements.

List of Subjects in 40 CFR Parts 51 and 52

Environmental protection, Administrative practice and procedure, Air pollution control, BACT, Baseline emissions, Carbon monoxide, Clean Units, Hydrocarbons, Intergovernmental relations, LAER, Lead, Major modifications, Nitrogen oxides, Ozone, Particulate matter, Plantwide applicability limitations, Pollution control projects, Reporting and recordkeeping requirements, Sulfur oxides.

Date

Marianne Horinko, Acting Administrator

For the reasons set out in the preamble, title 40, chapter I of the Code of Federal Regulations is amended as follows:

PART 51 - [Amended]

1. The authority citation for part 51 continues to read as follows:

Authority: 23 U.S.C. 101; 42 U.S.C. 7401 - 7671 g

Subpart I - [Amended]

2. Section 51.165 is amended:

- a. By revising paragraph (a)(1)(vii)(B).
- b. By revising paragraph (a)(1)(xxi).
- c. By revising paragraph (f)(6).

The revisions read as follows:

§51.165 Permit requirements.

(a) * * *

(1) * * *

(vii) * * *

(B) An existing emissions unit is any emissions unit that does not meet the requirements in paragraph (a)(1)(vii)(A) of this section. A replacement unit, as defined in paragraph (a)(1)(xxi) of this section, is an existing emissions unit.

* * * * *

(xxi) Replacement unit means an emissions unit for which

all the criteria listed in paragraphs (a)(1)(xxi)(A) through (D) of this section are met. No creditable emission reductions shall be generated from shutting down the existing emissions unit that is replaced.

(A) The emissions unit is a reconstructed unit within the meaning of §60.15(b)(1) of this chapter, or the emissions unit completely takes the place of an existing emissions unit.

(B) The emissions unit is identical to or functionally equivalent to the replaced emissions unit.

(C) The replacement does not alter the basic design parameters (as discussed in paragraph (h)(2) of this section) of the process unit.

(D) The replaced emissions unit is permanently removed from the major stationary source, otherwise permanently disabled, or permanently barred from operation by a permit that is enforceable as a practical matter. If the replaced emissions unit is brought back into operation, it shall constitute a new emissions unit.

* * * * *

(f) * * *

(6) Setting the 10-year actuals PAL level.

(i) Except as provided in paragraph (f)(6)(ii) of this

section, the plan shall provide that the actuals PAL level for a major stationary source shall be established as the sum of the baseline actual emissions (as defined in paragraph (a)(1)(xxxv) of this section) of the PAL pollutant for each emissions unit at the source; plus an amount equal to the applicable significant level for the PAL pollutant under paragraph (a)(1)(x) of this section or under the Act, whichever is lower. When establishing the actuals PAL level, for a PAL pollutant, only one consecutive 24-month period must be used to determine the baseline actual emissions for all existing emissions units. However, a different consecutive 24-month period may be used for each different PAL pollutant. Emissions associated with units that were permanently shut down after this 24-month period must be subtracted from the PAL level. The reviewing authority shall specify a reduced PAL level(s) (in tons/yr) in the PAL permit to become effective on the future compliance date(s) of any applicable Federal or State regulatory requirement(s) that the reviewing authority is aware of prior to issuance of the PAL permit. For instance, if the source owner or operator will be required to reduce emissions from industrial boilers in half from baseline emissions of 60 ppm NO_x to a new rule limit of 30 ppm, then the permit shall contain a future effective PAL level

that is equal to the current PAL level reduced by half of the original baseline emissions of such unit(s).

(ii) For newly constructed units (which do not include modifications to existing units) on which actual construction began after the 24-month period, in lieu of adding the baseline actual emissions as specified in paragraph (f)(6)(i), the emissions must be added to the PAL level in an amount equal to the potential to emit of the units.

* * * * *

3. Section 51.166 is amended:

- a. By revising paragraph (b)(7)(ii).
- b. By revising paragraph (b)(32).
- c. By revising paragraph (w)(6).

The revisions read as follows:

§51.166 Prevention of significant deterioration of air quality.

(b) * * *

(7) * * *

(ii) An existing emissions unit is any emissions unit that does not meet the requirements in paragraph (b)(7)(i) of this section. A replacement unit, as defined in paragraph (b)(32) of this section, is an existing emissions unit.

* * * * *

(32) Replacement unit means an emissions unit for which all the criteria listed in paragraphs (b)(32)(i) through (iv) of this section are met. No creditable emission reductions shall be generated from shutting down the existing emissions unit that is replaced.

(i) The emissions unit is a reconstructed unit within the meaning of §60.15(b)(1) of this chapter, or the emissions unit completely takes the place of an existing emissions unit.

(ii) The emissions unit is identical to or functionally equivalent to the replaced emissions unit.

(iii) The replacement does not change the basic design parameter(s) (as discussed in paragraph (y)(2) of this section) of the process unit.

(iv) The replaced emissions unit is permanently removed from the major stationary source, otherwise permanently disabled, or permanently barred from operation by a permit that is enforceable as a practical matter. If the replaced emissions unit is brought back into operation, it shall constitute a new emissions unit.

* * * * *

(w) * * *

(6) Setting the 10-year actuals PAL level.

(i) Except as provided in paragraph (w)(6)(ii) of this section, the plan shall provide that the actuals PAL level for a major stationary source shall be established as the sum of the baseline actual emissions (as defined in paragraph (b)(47) of this section) of the PAL pollutant for each emissions unit at the source; plus an amount equal to the applicable significant level for the PAL pollutant under paragraph (b)(23) of this section or under the Act, whichever is lower. When establishing the actuals PAL level, for a PAL pollutant, only one consecutive 24-month period must be used to determine the baseline actual emissions for all existing emissions units. However, a different consecutive 24-month period may be used for each different PAL pollutant. Emissions associated with units that were permanently shut down after this 24-month period must be subtracted from the PAL level. The reviewing authority shall specify a reduced PAL level(s) (in tons/yr) in the PAL permit to become effective on the future compliance date(s) of any applicable Federal or State regulatory requirement(s) that the reviewing authority is aware of prior to issuance of the PAL permit. For instance, if the source owner or operator will be required to reduce emissions from industrial boilers in half from baseline emissions of 60 ppm NO_x to a new rule limit of 30

ppm, then the permit shall contain a future effective PAL level that is equal to the current PAL level reduced by half of the original baseline emissions of such unit(s).

(ii) For newly constructed units (which do not include modifications to existing units) on which actual construction began after the 24-month period, in lieu of adding the baseline actual emissions as specified in paragraph (w)(6)(i), the emissions must be added to the PAL level in an amount equal to the potential to emit of the units.

* * * * *

PART 52 - [Amended]

1. The authority citation for part 52 continues to read as follows:

Authority: 42 U.S.C. 7401, et seq.

Subpart A - [Amended]

2. Section 52.21 is amended:

- a. By revising paragraph (b)(7)(ii).
- b. By revising paragraph (b)(33).
- c. By revising paragraph (aa)(6).

The revisions read as follows:

§52.21 Prevention of significant deterioration of air quality.

(b) * * *

(7) * * *

(ii) An existing emissions unit is any emissions unit that does not meet the requirements in paragraph (b)(7)(i) of this section. A replacement unit, as defined in paragraph (b)(33) of this section, is an existing emissions unit.

* * * * *

(33) Replacement unit means an emissions unit for which all the criteria listed in paragraphs (b)(33)(i) through (iv) of this section are met. No creditable emission reductions shall be generated from shutting down the existing emissions unit that is replaced.

(i) The emissions unit is a reconstructed unit within the meaning of §60.15(b)(1) of this chapter, or the emissions unit completely takes the place of an existing emissions unit.

(ii) The emissions unit is identical to or functionally equivalent to the replaced emissions unit.

(iii) The replacement does not alter the basic design parameters (as discussed in paragraph (cc)(2) of this section) of the process unit.

(iv) The replaced emissions unit is permanently removed from the major stationary source, otherwise permanently disabled, or permanently barred from operation by a permit that

is enforceable as a practical matter. If the replaced emissions unit is brought back into operation, it shall constitute a new emissions unit.

* * * * *

(aa) * * *

(6) Setting the 10-year actuals PAL level.

(i) Except as provided in paragraph (aa)(6)(ii) of this section, the plan shall provide that the actuals PAL level for a major stationary source shall be established as the sum of the baseline actual emissions (as defined in paragraph (b)(48) of this section) of the PAL pollutant for each emissions unit at the source; plus an amount equal to the applicable significant level for the PAL pollutant under paragraph (b)(23) of this section or under the Act, whichever is lower. When establishing the actuals PAL level, for a PAL pollutant, only one consecutive 24-month period must be used to determine the baseline actual emissions for all existing emissions units. However, a different consecutive 24-month period may be used for each different PAL pollutant. Emissions associated with units that were permanently shut down after this 24-month period must be subtracted from the PAL level. The reviewing authority shall specify a reduced PAL level(s) (in tons/yr) in the PAL permit to

become effective on the future compliance date(s) of any applicable Federal or State regulatory requirement(s) that the reviewing authority is aware of prior to issuance of the PAL permit. For instance, if the source owner or operator will be required to reduce emissions from industrial boilers in half from baseline emissions of 60 ppm NOx to a new rule limit of 30 ppm, then the permit shall contain a future effective PAL level that is equal to the current PAL level reduced by half of the original baseline emissions of such unit(s).

(ii) For newly constructed units (which do not include modifications to existing units) on which actual construction began after the 24-month period, in lieu of adding the baseline actual emissions as specified in paragraph (aa)(6)(i), the emissions must be added to the PAL level in an amount equal to the potential to emit of the units.